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10/769,158

01/29/2004

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EXAMINER

DABNEY, PHYLESHA LARVINIA

ART UNIT

PAPER NUMBER

2614

MAIL DATE

DELIVERY MODE

05/03/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

Application No.

10/769,158

Applicant(s)

SMITH ET AL.

Examiner

Phylesha L. Dabney

Art Unit

2614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 18 October 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-9, 11-18, 25-29, 32, 33 and 36 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 25-29, 32, 33 and 36 is/are allowed.
- 6) ☒ Claim(s) 1-9, 11 and 15-18 is/are rejected.
- 7) ☒ Claim(s) 12-14 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 1/29/04 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### DETAILED ACTION

The action is in response to the Amendment received on 8 February 2007 in which claims 1-9, 11, 15-19, 25-29, 32-33, and 36 are pending. Claims 10, 19-24, 30-31, and 34-35 were cancelled.

#### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-9, 11, and 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over DeKalb (U.S. Patent No. 6,810,987) in view of Lin (U.S. Patent No. 6,704,429).

Regarding claims 1-4 and 8-9, as shown in figures 1-8, DeKalb teaches a device for facilitating hearing, the device comprising: an earpiece (10) configured to be captured at least partially within the conchae (using 22) of an ear; and wherein the earpiece (10) is configured for use in either ear by re-orienting the earpiece without re-configuring the earpiece.

Dekalb fails to specifically teach construction of the earpiece including whether an acoustic conduit is included or excluded from the configuration such that sound is able to pass therethrough earpiece (newly added limitation to claim 1).

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Lin evidence to support official notice) teaches constructing an earpiece having an acoustic conduit for allowing sound to pass therethrough (Lin; for example, fig. 5 teaches a passageway/conduit 42-43 for passing sound).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a passageway/conduit in the earpiece of DeKalb as evidenced by Lin for the benefit of providing direction for the sound from the device to the user's ear.

Regarding claims 5-7, DeKalb teaches the device as recited in claim 1, wherein the earpiece (10) is generally symmetric about a plane that bisects the earpiece between the top and bottom thereof.

Regarding claim 11, DeKalb teaches the device as recited in claim 1, wherein the earpiece (10) is comprised of at least one rib (figs. 2-4, 6-8).

Regarding claims 15-17, Dekalb does not teach the device as recited in claim 1, wherein the earpiece (10) is formed of any particular type of material including a resilient polymer having a Shore A durometer of between approximately 35 and approximately 45.

However, it is known to fabricate the earpiece of resilient materials such as rubber, silicone, vinyl, etc., that can have a duromenter hardness in the range between 35 and 45 for providing softness and comfort to the user.

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Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to fabricate the earpiece of resilient materials such as rubber, silicone, vinyl, etc., in the invention of DeKalb for the reasons stated above.

Regarding claim 18, DeKalb does not teach the device as recited in claim 1, wherein the earpiece (10) is formed of any particular type of material including injection molding.

However, it is known to fabricate the earpiece of injection molded material for providing softness and comfort to the user.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to fabricate the earpiece of injection molded material in the invention of DeKalb for the reasons stated above.

### ***Response to Arguments***

Furthermore, the applicant did not traverse the examiner's assertion of official notice with respect to claims **15-18, 25-27, and 32-33** as noted in previous office action (dated 3 May 2006); therefore, the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant failed to traverse the examiner's assertion of official notice (MPEP 2144.03).

***Allowable Subject Matter***

Claims 12-14 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 25-29, 32-33 and 36 are allowed. With respect to the claims, the prior art of record fails to teach an earpiece comprising a generally arcuate rib and a generally vertical rib formed so as to generally define the letter D, and also comprises a boss having a bore formed there through, the boss being formed to the generally vertical rib; and wherein the earpiece is sufficiently symmetrical to be configured for use in either the right or left ear, as substantially described and connected with the other functional language of these claims

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Phylesha L. Dabney whose telephone number is 571-272-7494.

The examiner can normally be reached on Mondays, Wednesdays, Fridays 8:30-4 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Curtis Kuntz can be reached on 571-272-7499. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

**Any response to this action should be mailed to:**  
Commissioner of Patents and Trademarks  
P O Box 1450  
Alexandria, VA 22313-1450


**Or faxed to:**  
(703) 273-8300, for formal communications intended for entry and for informal or draft communications, please label "Proposed" or "Draft" when submitting an informal amendment.

**Hand-delivered responses should be brought to:**  
Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

April 19, 2007

PLD

  
CURTIS KUNTZ  
SUPERVISOR  
APR 2007